HONG KONG BANK (MALAYSIA) BHD.

v.

RAJA LETCHUMI RAMARAJOO & ORS.

COURT OF APPEAL, KUALA LUMPUR
TUAN GOPAL SRI RAM JCA
DATO' SITI NORMA YAAKOB JCA
DATO' ABDUL MALEK AHMAD JCA
[CIVIL APPEAL NO: A-02-58-95]
27 FEBRUARY 1996

CIVIL PROCEDURE: *Striking out - Want of prosecution - Principles - Whether Court to have regard to whole history of case - Plaintiff allowing suits to remain dormant in High Court for 10 years - Whether there was clear lack of interest - Whether delay contumelious and inordinate - Duties of appellate Court.*

In 1982 the appellant filed two separate suits in the High Court at Ipoh against the respondents. The appellant then obtained several orders from the Court, including an order for early trial. The appellant had not acted upon the orders and as a result the suits remained dormant on the High Court file for several years. In 1992 the respondents applied to strike out the suits but the application was disallowed by Ong See Seng J. The respondents appealed but again the appeal was dismissed by the Supreme Court on 27 April 1993. However, in dismissing the appeal, the Supreme Court made a further order that the suits be heard in May 1993 before another Judge.

On 5 May 1993, the appellant wrote to the High Court at Ipoh, informing the latter about the Supreme Court order and asking for a hearing in May 1993. As it was, however, the Supreme Court order had not been extracted by the appellant, and so, the same was not placed before the Ipoh High Court. This apart, the appellant also did not communicate to the High Court the actual terms of the Supreme Court order. The result was that neither the Senior Judge at the said High Court, nor the relevant Senior Assistant Registrar, were aware that it was part of the Supreme Court order that another Judge, and not Ong See Seng J, ought to have heard the suits. What followed was that the Senior Assistant Registrar (the SAR) had sought to fix the hearing of the suits before Ong See Seng J. The said Judge was however indisposed in May 1993, and on 14 May 1993 the SAR wrote to the appellant, informing the appellant that the suits could not be heard in May because Ong See Seng J was on long leave. It was clear by this letter that the SAR or the High Court at Ipoh was unappraised of the actual terms of the Supreme Court order but the appellant took no steps to rectify the situation. Consequently, no effort was made to inform the said High Court that the suits were not meant to be heard before Ong See Seng J and that they ought to be scheduled before another Judge.

As things turned out, on 25 October 1993, the Deputy Registrar of the High Court, Ipoh, informed the parties that the suits would be heard on 25 April 1994 in Court No. 2, which was Ong See Seng J's Court. The hearing however did not proceed as the learned Judge was not available. On 27 June 1994, the appellant took out a summons praying for an order that the suits be fixed for hearing. On 21 October 1994, the respondents took out a summons to strike out the suits "pursuant to the order of the Supreme Court dated 27 April 1993". Both summonses were heard by Ahmad Fairuz J (as he then was), who allowed the respondents' application and struck out the suits. Hence, this appeal by the appellant. Before the Court of Appeal the sole issue that arose was whether the learned Judge was correct in the interpretation he placed upon the order of the Supreme Court and in deciding the way he did.

Held:

Per Gopal Sri Ram JCA (delivering the judgment of the Court):

[1] The orders of the Supreme Court was made against the background of what transpired in the suits. In interpreting that Order, this Court therefore must not confine itself solely to the events that transpired between the date of that order and the orders made by the learned Judge. Rather, the Court must also have regard to the whole history of the case.

[2] The principle that governs this appeal is that, every superior Court has inherent jurisdiction to strike out actions of plaintiffs who have been guilty of inordinate delay in prosecuting them. This power may be exercised *suo motu* or upon the application of any interested party.

[3] The seriousness with which the Supreme Court viewed the matter and the urgency which it attached to it are reflected in the short period of time that was allowed for the disposal of the suit. Bearing in mind the fact that the order was made at the Court's sitting in Ipoh, that the appellant's solicitors were in Ipoh, and that the appellant's Counsel was present when the order was pronounced, it was incomprehensible why the appellant's solicitors should have waited until 5 May 1993 to write to the High Court, and not writing thereto on the very same day of the order, or even the next day, asking for a date in May.

[4] Even when the appellant's solicitors wrote to the High Court on 5 May 1993, they did not communicate the terms of the Supreme Court order. They were aware that Ong See Seng J was not meant to deal with the suits, yet they did not mention this vital fact. Clearly, they had proceeded in a rather lackadaisical manner. The re-assignment of the suits to Ong See Seng J would not have taken place had the solicitors for the appellant been more diligent.

[5] The prejudice that will occur when a case is required to be tried several years after its institution and the occurrence of the events giving rise to the alleged cause of action is in itself a ground for striking out an action. In this case there is the added consideration that the appellant paid lip service obedience to the order of the Supreme Court.

[6] The circumstances of the present case when taken as a whole fairly support an inference that the appellant is not really interested in the cases it has filed. There is therefore no plausible reason for allowing the suits to remain on the file. This aside, there is also no misdirection by the learned Judge upon any point.

[Appeal dismissed]

***[Bahasa Malaysia** Translation of Headnotes]*

***PROSEDUR SIVIL:** Pembatalan - Ketiadaan pendakwaan - Prinsip-prinsip - Samada Mahkamah harus mengambil tahu keseluruhan sejarah kes - Plaintif membenarkan guaman kekal terpendam dalam Mahkamah Tinggi selama 10 tahun - Samada jelas menunjukkan sikap tidak mengambil berat - Samada kelewatan melampau dan keterlaluan - Tugas-tugas Mahkamah Rayuan.*

Dalam tahun 1982 perayu telah memfailkan dua guaman yang berasingan di Mahkamah Tinggi Ipoh terhadap responden. Perayu kemudiannya telah mendapatkan beberapa perintah daripada Mahkamah, termasuk satu perintah untuk perbicaraan awal. Perayu telah tidak bertindak atas perintah-perintah tersebut dan akibatnya guaman-guaman itu telah kekal terpendam pada fail Mahkamah Tinggi selama beberapa tahun. Dalam tahun 1992, responden-responden telah memohon untuk membatalkan guaman-guaman tersebut tetapi permohonan tersebut ditolak oleh Hakim Ong See Seng. Responden-responden telah merayu, tetapi sekali lagi rayuan tersebut telah ditolak oleh Mahkamah Agung pada 27 April 1993. Walaubagaimanapun, ketika menolak rayuan tersebut, Mahkamah Agung telah membuat satu perintah yang seterusnya bahawa guaman-guaman tersebut hendaklah didengar dalam bulan Mei 1993 di hadapan seorang Hakim yang lain.

Pada 5 Mei 1993, perayu telah menulis kepada Mahkamah Tinggi di Ipoh, memaklumkannya mengenai perintah Mahkamah Agung tersebut dan meminta satu perbicaraan dalam bulan Mei 1993. Namun begitu, sebagaimana keadaannya, perintah Mahkamah Agung tersebut tidak dikeluarkan oleh perayu, dan oleh itu, ianya telah tidak dikemukakan di hadapan Mahkamah Tinggi Ipoh. Selain itu, perayu juga tidak memaklumkan kepada Mahkamah Tinggi tersebut akan terma-terma sebenar perintah Mahkamah Agung itu. Hasilnya Hakim Kanan di Mahkamah Tinggi tersebut mahupun Penolong Kanan Pendaftar yang relevan tidak mengetahui bahawa ianya adalah sebahagian daripada perintah Mahkamah Agung tersebut bahawa seorang Hakim yang lain, dan bukannya

Ong See Seng H yang seharusnya mendengar guaman-guaman tersebut. Apa yang berlaku ialah Penolong Kanan Pendaftar (PKP) telah cuba untuk menetapkan perbicaraan guaman-guaman tersebut di hadapan Ong See Seng H. Hakim tersebut walaubagaimana pun tidak sihat pada bulan Mei 1993, dan pada 14 Mei 1993 PKP telah menulis kepada perayu, memaklumkan bahawa guaman-guaman tersebut tidak dapat didengar dalam bulan Mei kerana Ong See Seng H bercuti panjang. Ianya jelas daripada surat ini bahawa PKP atau Mahkamah Tinggi di Ipoh tidak mengetahui tentang terma-terma sebenar perintah Mahkamah Agung tetapi perayu tidak mengambil apa-apa langkah untuk memperbaiki situasi tersebut. Akibatnya, tiada usaha telah dilakukan bagi memaklumkan kepada Mahkamah Tinggi tersebut bahawa guaman itu tidak bermaksud untuk didengar di hadapan Ong See Seng H dan bahawa ianya haruslah dijadualkan atau ditetapkan di hadapan seorang Hakim yang lain.

Sepertimana keadaannya, pada 25 Oktober 1993, Penolong Pendaftar Mahkamah Tinggi Ipoh, telah memaklumkan pihak-pihak terbabit bahawa guaman-guaman berkenaan akan didengar pada 25 April 1994 dalam Mahkamah No. 2 yang mana adalah Mahkamah Hakim Ong See Seng. Perbicaraan tersebut walaubagaimanapun telah tidak diteruskan kerana ketiadaan Hakim yang bijaksana tersebut. Pada 27 Jun 1994, perayu telah mengeluarkan satu saman memohon untuk mendapatkan perintah supaya guaman-guaman tersebut ditetapkan untuk perbicaraan. Pada 21 Oktober 1994, responden-responden telah mengeluarkan satu saman untuk membatalkan guaman tersebut "selaras dengan perintah Mahkamah Agung bertarikh 27 April 1993." Kedua-dua saman tersebut telah didengar oleh Ahmad Fairuz H (sebagaimana beliau ketika itu), yang membenarkan permohonan responden-responden dan menolak guaman-guaman itu. Dengan itu mengakibatkan rayuan ini oleh perayu. Di hadapan Mahkamah Rayuan, satu-satunya isu yang berbangkit adalah samada Hakim yang bijaksana betul dalam pentafsiran yang beliau kemukakan atas perintah Mahkamah Agung tersebut dan dalam membuat keputusan sebagaimana yang telah dilakukan olehnya.

Diputuskan:

Oleh Gopal Sri Ram HMR (menyampaikan penghakiman Mahkamah):

[1] Perintah-perintah Mahkamah Agung tersebut telah dibuat dengan berlatarbelakangkan apa yang berlaku dalam guaman-guaman tersebut. Dalam mentafsirkan perintah itu, Mahkamah ini dengan itu tidak seharusnya membataskan dirinya semata-mata kepada peristiwa-peristiwa yang berlaku antara tarikh perintah itu dan perintah-perintah yang dibuat oleh Hakim yang bijaksana tersebut. Mahkamah mestilah juga mengambil perhatian akan keseluruhan sejarah kes tersebut.

[2] Prinsip yang menguasai rayuan ini adalah, bahawa setiap Mahkamah atasan mempunyai bidangkuasa sedia ada untuk membatalkan tindakan-tindakan plaintif yang bersalah kerana kelewatan yang melampau dalam mendakwa

tindakan-tindakan berkenaan. Kuasa ini boleh dilaksanakan secara *suo motu* atau di atas permohonan oleh mana-mana pihak yang berkepentingan.

[3] Keadaan tentang seriusnya Mahkamah Agung melihat perkara yang berbangkit dan kepentingan yang dikenakan padanya jelas terbayang dalam tempuh masa singkat yang telah dibenarkan bagi penyelesaian guaman tersebut. Dengan memikirkan hakikat bahawa perintah ini telah dibuat ketika Mahkamah Agung bersidang di Ipoh, bahawa peguamcara perayu berada di Ipoh, dan bahawa peguam perayu hadir ketika perintah tersebut dilafazkan, ianya adalah tidak dapat difahamkan mengapa peguamcara perayu seharusnya menunggu sehingga 5 Mei 1993 untuk menulis kepada Mahkamah Agung dan tidak menulis kepadanya pada hari yang sama perintah tersebut dibuat atau pun keesokannya, meminta diberikan satu tarikh dalam bulan Mei.

[4] Pun begitu, sewaktu menulis kepada Mahkamah Tinggi pada 5 Mei 1993, peguamcara perayu tidak menyampaikan terma-terma perintah Mahkamah Agung tersebut. Mereka mengetahui bahawa Hakim Ong See Seng tidak seharusnya menguruskan guaman-guaman tersebut, tetapi mereka tidak menyebut fakta penting ini. Jelasnya, mereka telah meneruskan dengan sikap acuh tak acuh. Penyerahan semula guaman-guaman tersebut kepada Hakim Ong See Seng tentunya tidak akan berlaku jika peguamcara bagi pihak perayu lebih prihatin.

[5] Kemudaratan yang akan berlaku bilamana sesuatu kes perlu dibicarakan beberapa tahun selepas permulaannya dan berlakunya peristiwa-peristiwa yang menyebabkan berbangkitnya kausa tindakan yang dikatakan itu adalah dengan sendirinya satu alasan bagi membatalkan sesuatu tindakan. Dalam kes ini terdapat pertimbangan yang lebih bahawa perayu mematuhi perintah Mahkamah Agung tersebut secara yang tidak bersungguh-sungguh.

[6] Keadaan kes semasa ini bilamana diteliti secara keseluruhannya, menyokong satu inferens bahawa perayu tidak begitu berminat dengan, dan tidak mengambil berat kes yang difailkan. Dengan itu tidak terdapat alasan yang munasabah bagi membiarkan guaman-guaman tersebut kekal. Selain itu, tidak terdapat apa-apa salah-arahan oleh Hakim yang bijaksana di atas apa-apa perkara.

[Rayuan ditolak]

Cases referred to:
Vasudevan v. T. Damodaran & Anor. [1981] 2 MLJ 150 ***(refd)***

For the appellant - Paul Kwong (Evelyn Khoo & Mohd Sharil Tarmizi with him); M/s. Azman Davidson & Co.
For the respondent - Hira Singh; M/s. Asbir Hira Singh & Co.

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JUDGMENT

Gopal Sri Ram JCA:

This case has a long and chequered history. However, the record provided has none of the relevant cause papers nor indeed a complete chronology of all the relevant events that transpired in the action. We have therefore, *ex abundanti cautela*, and in the interests of justice, called for and examined some of the cause papers and the minutes in the files of the two civil suits to ascertain what had actually transpired between the date of issue of the writ and the more recent events to which the appellant has attempted to restrict us in the consideration of this appeal.

It all began when, in 1982, the appellant (whom we shall, throughout this judgment, refer to as "the Bank") issued a writ against the respondents in Civil Suit No: 127/82. Initially, the Bank displayed a great deal of interest in the matter. It obtained several orders, including an order for early trial. That order was made by Ajaib Singh J (as he then was) as long ago as 2 July 1982. Later that year, on 20 November 1982, the Bank obtained an order for directions, including an order consolidating Suit 127/82 with Suit 135/82. But the Bank's initial interest in the matter appears to have waned.

Thus, although it obtained an order for directions in November 1982, it took no steps to extract the order made on its application. Ultimately, it was the respondents' solicitors who extracted that order. Further, the Bank did nothing to act upon the order for early trial made in July 1982. And for the best part of ten years, the consolidated suits lay dormant.

Not unnaturally, the respondents were keen on putting a speedy end to the litigation that was hanging over their heads. So, in 1992, they applied to have the actions struck out, but failed before Ong See Seng J. An appeal by them to the Supreme Court (which was heard on 27 April 1993) also proved unsuccessful. However, the Supreme Court when dismissing their appeal made the following additional order:

> **And it is further ordered** that the trial of the consolidated suits in the High Court be heard before another Judge within one month: (in May 1993) and in the event the respondent fails to comply with this order then the consolidated suits in the High Court be struck out with costs here and below.

Even this order was not timeously extracted by the Bank's solicitors. In the end, it was the respondents' solicitors who extracted it. There is some correspondence upon it to which we will refer momentarily.

Returning to the chronology of events, the Bank, purporting to act on the order of the Supreme Court, wrote to the secretary to Mohtar Abdullah J, the then senior Judge in the High Court at lpoh, a letter dated 5 May 1993, which, when shorn of its formalities reads as follows:

We act for the respondents (plaintiffs) in the above matters, respectively.

We also refer to the letter dated 11 July 1989 (ref: [119] Civil Suit No. 127-1982, copy enclosed) from the High Court, lpoh.

The above appeals to the Supreme Court were heard on 27 April 1993 in Ipoh. The Supreme Court dismissed the appeal in respect of "want of prosecution", and stated that steps be taken to fix the suit for hearing in May 1993 before the High Court, Ipoh, failing which the appellants (defendants) are at liberty to strike off the suit for want of prosecution (by making a 2nd such application against our clients).

In the circumstances, we earnestly appeal to His Lordship to fix the suit for hearing **this** month.

We shall appreciate very much your prompt attention on the matter.

On 13 May 1993, the respondents' solicitors wrote to the Bank's solicitors a letter which contains the following material paragraphs:

We refer to the above matters and the letter dated 5 May 1993 addressed to the Private Secretary to His Lordship, the High Court Judge in lpoh a carbon copy of which was extended to us on 11 May 1993.

Please let us have the draft of the Orders of the Supreme Court for our approval so that you can then produce that Order to the Court.

Your letter to the learned Judge does not give the full picture of the orders made by the Supreme Court.

This letter crossed the Bank's, solicitors letter of the same date which was to the following effect:

We refer to your clients' above appeal in respect of want of prosecution which was dismissed by the Supreme Court on 27 April 1993.

We would like to know whether it is your clients' intention to extract the Order of the Court thereof. If we do not hear from you within the next 5 days from today, we shall proceed to extract same.

On 14 May 1993, the Senior Assistant Registrar of the High Court, Ipoh wrote, informing the Bank's solicitors that the suits could not be heard in the month of May because Ong See Seng J would be away on long leave.

It is plain from this letter that the Registrar and the Senior Judge were unaware that the Supreme Court had, in its order, directed the suits to be heard before a Judge other than Ong See Seng J. However, the Bank did nothing to clarify the position and was quite content to let matters rest. Had it placed the order of the Supreme Court before the Registrar or appraised the High Court of the actual terms of the order made by the Supreme Court, those responsible

for the scheduling of cases in the High Court, Ipoh, would not, have been labouring under the misapprehension that the suits had to be heard by Ong See Seng J, to whose Court they had been originally assigned.

A substantial part of the month of June 1993 was spent in the parties quibbling over the terms of the order made by the Supreme Court on 27 April 1993. The Bank, however, took no further steps to inform the High Court at lpoh that the suits were not meant to be heard before Ong See Seng J and that they ought to be scheduled before another Judge.

By a letter dated 25 October 1993, the Deputy Registrar of the High Court, Ipoh, informed the parties that the suit would be heard on 25 April 1994 in Court No. 2 which, we were advised by Counsel for the respondent, was Ong See Seng J's Court. It is fairly obvious that even at this point in time, the High Court at Ipoh had not been appraised of the terms of the order made by the Supreme Court some six months earlier.

On 15 April 1994, the Bank's solicitors wrote to the Deputy Registrar of the High Court, lpoh, requesting that the hearing scheduled on the 25th of that month be vacated on the ground that the solicitor having conduct of the matter had taken ill. The hearing did not proceed as scheduled as the learned Judge was not available.

On 27 June 1994, the Bank's solicitors took out a summons praying for an order that the suit be fixed for hearing. We observe that such an application was unnecessary and added nothing to the state of affairs that had prevailed theretofore.

On 21 October 1994, the respondents' solicitors took out a summons to strike out the suits "pursuant to the order of the Supreme Court dated 27 April 1993 *vide* Civil Appeal No. 02-123-1992".

Both summonses came on for hearing before Ahmad Fairuz J (as he then was) on 27 October 1994, and he, having heard the arguments of Counsel, allowed the respondents' application and struck out the suits. The Bank's application, in consequence, was dismissed. It is against these orders of the Judge that the Bank has appealed to us. We heard this appeal on, 2 January 1996 and reserved judgment.

Counsel for the respondent has raised a number of arguments before us, most of which were highly technical and entirely irrelevant. We are of the view that the only relevant question before us is whether the learned Judge was correct in the interpretation he placed upon the order of the Supreme Court when he struck out the suits. Counsel for the appellant has argued that in the resolution of this question, we ought to confine ourselves solely to the events that transpired between the date of the Supreme Court's order and the orders made by the learned Judge which are the subject matter of this appeal. On

the other hand, respondents' Counsel has argued that we ought not to be so confined in our review of the background to the suits. He says that we must have regard to the whole history of the case, including those facts adverted to by the Bank.

We think that there is merit in the submission made by Encik Hira Singh of Counsel for the respondents. In our judgment, it would be wrong for us to wear the kind of blinkers suggested by the Bank when considering the merits of this appeal. It must not be overlooked that the order of the Supreme Court was made against the background of what had previously transpired in the suits. Can we then shut our eyes to that background when we come to interpret the order of the Supreme Court? We do not think we are entitled to do that.

In taking the course suggested by respondents' Counsel, for which he cited no authority, we act by analogy with the course a Court takes when interpreting a statute. Ever since *Heydon's* case [1584] 76 ER 637, Courts are obliged to look at the historical background to a statute in order to ascertain the purpose for which it was enacted. In much the same way - although it is not a statute - do we approach the order of the Supreme Court in this case, to see its purpose.

As we have earlier observed, the enthusiasm with which the Bank approached the suits in question at the early stages of litigation waned with the passage of time. Their lack of interest in the matter is evinced by the way in which they have conducted this litigation. We would, in particular, make the following comments:

(1) The suits were filed in 1982. Despite an order for early trial being made in July 1982 and directions having been given in November of the same year, no steps were taken to act upon these. The Bank did not even bother to extract the order for directions;

(2) For a period of 10 years, no steps appear to have been taken to approach the Court to fix the suits for hearing;

(3) The Supreme Court made its order on 27 April 1993 directing the suits to be heard in May of that year. The seriousness with which the Supreme Court viewed the matter and the urgency which it attached to it are reflected in the short period of time that was allowed for the disposal of the suits. Yet, the Bank did nothing until 5 May 1993. The lapse of time between the making of the order by the Supreme Court and the date on which the Bank acted may be only a few days. However, in the context of the level of urgency with which parties and the High Court were called upon to act does not excuse any delay, save for the most exceptional of reasons. The order of the Supreme Court was made at its sitting in lpoh. As disclosed in the

correspondence, the Bank's solicitors are in lpoh. Counsel for the instant appellant was present when the order was pronounced and must therefore be taken to be aware of its terms. It is therefore incomprehensible why the Bank's solicitors could not have written to the High Court at Ipoh on the very same, or even the next day; asking for a date in May;

(4) Even when they wrote to the High Court in early May, the Bank's solicitors did not communicate the terms of the Supreme Court order. They were aware that Ong See Seng J was not meant to deal with the suits. Yet they did not mention this vital fact. With respect, they proceeded in a rather lackadaisical manner. They failed to address their minds sufficiently to the certain delay that their letter would cause. Of course, the Registry of the High Court would, unless it was otherwise advised, re-assign the suits to Ong See Seng J although he was never meant to hear them. This is precisely what happened. It would not have been so if those having conduct of the matter on behalf of the Bank had been diligent;

(5) In the months that went by, nothing was done to correct the erroneous impression that had formed in the mind of the Deputy Registrar. Meaning no disrespect, this certainly reflects a "couldn't care" attitude on the part of the Bank and its legal advisers. Had there been a genuine desire to carry the order of the Supreme Court into effect, one would have found a more careful approach to the language in which the letter of 5 May 1993 was cast.

Counsel for the respondents' cited several authorities on the consequences that flow from a breach of the terms of a peremptory or "unless order". With respect none of them are really relevant to the facts of the present appeal. The principle that governs this appeal, we apprehend, is that every superior Court has inherent jurisdiction to strike out actions of plaintiffs who have been guilty of inordinate delay in prosecuting them. This power may be exercised *suo motu* or upon the application of any interested party. The authorities that support this proposition are legion and we find it quite sufficient to quote from one of them.

In *Vasudevan v. T. Damodaran & Anor*. [1981] 2 MLJ 150 Abdoolcader J (as he then was) when delivering the judgment of the then Federal Court said:

> It would perhaps be more convenient and appropriate in this case to transpose the normal sequence and deal with the principles of law arising for consideration and application to the facts of the matter before adverting to the history and factual background of these proceedings. The principles involved pertain to the dismissal of an action for want of prosecution and the circumstances in which an appellate Court will interfere with the discretion of a Court of first instance.

(a) Dismissal of action for want of prosecution

The House of Lords in *Birkett v. James* [1978] AC 297, approving the decision of the English Court of Appeal in a trilogy of appeals reported *sub nomine Allen v. Sir Alfred McAlpine & Sons Ltd.* [1968] 2 QB 229, held that the power of the Court to dismiss an action for want of prosecution should be exercised only where the plaintiffs default had been intentional and contumelious or where there had been inordinate and inexcusable delay on his or his lawyers' part giving rise to a substantial risk that a fair trial would not be possible or to serious prejudice to the defendant but, other than in a case of contumelious conduct on the plaintiffs part, should not normally be exercised where the delay had not extended beyond the end of the limitation period for the cause of action, and the House further observed *per curiam* that where a defendant is seriously prejudiced by a writ the plaintiff must thereafter pursue his action with diligence and the action can only be dismissed (after expiry of the limitation period) for want of prosecution if the delay subsequent to the issue of the writ exceeds the time limits prescribed by the rules of Court and is inordinate and inexcusable having regard to the delay before the issue of the writ, and the delay after the issue of the writ has caused some additional prejudice to the defendant beyond that already suffered by him by reason of the delay in bringing the action. The House of Lords in *Bremer Vulkan Schiffbau Und Maschinenfabrik v. South India Shipping Corporation* [1981] 1 All ER 289, again restated and discussed these principles but held they do not apply to arbitration proceedings.

We would specifically refer to the propositions enunciated by Salmon LJ, in *Allen* (at p. 268) to the effect *inter alia* in relation to the inordinate delay being inexcusable that as a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable, and again with regard to the question of serious prejudice to defendants by the delay, that this may be prejudice at the trial of the issue between themselves and the plaintiff or between each other or between themselves and third parties, and that as a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial. The decision of the English Court of Appeal in *Biss v. Lambeth, Southwark and Lewisham Area Health Authority (Teaching)* [1978] 1 WLR 382, (distinguishing *Birkett* on a point under the English Limitation Acts, 1939 to 1975 not material for the purpose of the present appeal) is to the effect that in determining whether the delay after the writ had been issued is substantial, the Court has to consider whether the delay has prejudiced both a fair trial and the defendants, and in considering the prejudice to the defendants, the delay after the issue of the writ has to be considered against the delay before issue, and whether such delay has substantially prejudiced the defendants. We would draw particular attention to the judgment of Lord Denning MR, stating (at p. 389) that prejudice to a defendant by a plaintiff's delay is not limited to the death or disappearance of witnesses or their fading memories or in the loss or destruction of records since there is much prejudice to a defendant in having an action hanging over his head indefinitely, not knowing when it is going to be brought to trial.

(b) Review of discretion by an appellate Court

There is a catenation of cases on this point and it will suffice to cull and refer to a few which restate the well-settled principles. An appellate Court can review questions of discretion if it is clearly satisfied that the Judge was wrong but there is a presumption that the Judge has rightly exercised his discretion and the appellate Court must not reverse the Judge's decision on a mere 'measuring cast' or on a bare balance as the mere idea of discretion involves room for choice and for differences of opinion (*Charles Osenton & Co. v. Johnston* [1942] AC 130, at p. 148, per Lord Wright). The Privy Council held in *Ratnam v. Cumarasamy & Anor*. [1965] 1 MLJ 228, that an appellate Court will not interfere with the discretion exercised by a lower Court unless it is clearly satisfied that the discretion had been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice, referring to *Evans v. Bartlam* [1937] AC 473.

The House of Lords, approving the decision of the English Court of Appeal in *Ward v. James* [1966] 1 QB 273, held to the same effect in *Birkett* (at pp. 317, 326). For good measure, we would refer to the felicitous expression of Goulding J, in *Re Reed (a debtor)* [1979] 2 All ER 22, on this point (at p. 25):

... the duties of an appellate Court in such a matter as this are, in my judgment, confined to those normally exercisable where the lower Court has a discretion, that is to say, we are not justified in setting aside or varying an order simply because we may think we might have come to a different conclusion ourselves on similar material. We can only interfere if either we can see that the Court below has applied a wrong principle, or has taken into account matters that are in law irrelevant, or has excluded matters that it ought to have taken into account, or otherwise that no Court, properly instructing itself in the law, could have come to the conclusion which in fact was arrived at.

In our judgment, the prejudice that will occur when a case is required to be tried several years after its institution and the occurrence of the events giving rise to the alleged cause of action is in itself a ground for striking out an action. In the present case there is the added consideration that the Bank paid lip service obedience to the order of the Supreme Court.

The circumstances of the present case when taken as a whole fairly support an inference that the Bank is not really interested in the cases it has filed. There is, therefore, no plausible reason for allowing these suits to remain on file.

Having come to the foregoing conclusion, we have examined the judgment of the learned Judge with a critical eye and find no error in principle therein. We observe that the Judge appears to have been conscious of the purpose behind the order of the Supreme Court and the long delay that the Bank has been guilty of in prosecuting the suits. His interpretation of the Supreme Court's order is entirely correct. There has accordingly been no misdirection by the Judge of himself upon any point.

It must not be forgotten that at the end of the day what is in issue is essentially the exercise of discretion by the learned Judge. The principles upon which an appellate Court will interfere in a case such as this are clearly set out in the judgment of the Federal Court in *Vasudevan v. Damodaran (supra).* The present case does not fall within any of the categories of cases which entities appellate interference.

Accordingly, for the reasons we have given, we are left with no alternative but to dismiss this appeal. All orders made by the Judge are hereby affirmed. The appellant Bank will pay to the respondents the costs of and occasioned by this appeal. The deposit lodged in Court by the appellant shall be paid out to the respondents to account of their taxed costs.

Reported by W.A. Sharif